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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 346

LEON KAMINER, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 23-25) is not reported. The *per curiam* opinion of the Court of Appeals (R. 27-28) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 11, 1949 (R. 29). The petition for

a writ of certiorari was filed September 22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien in custody in the Southern District of New York pursuant to an allegedly illegal order of permanent exclusion may seek in the District Court for the District of Columbia, under the Federal Declaratory Judgment Act, a judicial declaration that the order is void and the detention illegal, or whether he should be required to seek redress by writ of habeas corpus in the district of detention.

STATUTE INVOLVED

The Federal Declaratory Judgment Act (48 Stat. 955, 28 U.S.C. [1948 rev.] 2201) provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

Petitioner, an alien, arrived at the Port of New York on October 16, 1948 (R. 2, 9). He was temporarily detained at Ellis Island pending further

investigation of his eligibility to enter the United States (R. 12). On December 28, 1948, the Attorney General, on the basis of evidence and information of a confidential nature, the disclosure of which was deemed by him to be prejudicial to the public interest, ordered petitioner to be permanently excluded from the United States, without a hearing before a board of special inquiry, as an alien whose admission would be prejudicial to the interests of the United States (R. 12-13). On March 3, 1949, the Secretary of State, after consultation with the Attorney General, likewise directed that petitioner be permanently excluded, thereby confirming the previous order of the Attorney General (R. 13, 20).[1]

On January 8, 1949, following the entry of the Attorney General's order of permanent exclusion, petitioner filed in the District Court for the District of Columbia, pursuant to 28 U.S.C. [1948 rev.] 2201, *supra*, p. 2, a petition for a declaratory judgment (R. 1-6), which gave rise to the instant

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[1] The orders of the Attorney General and Secretary of State were made pursuant to 8 C.F.R. 175.53 and 175.57, regulations issued pursuant to Presidential Proclamation No. 2523 of November 14, 1941 (6 F. R. 5821-5823), which Proclamation, in turn, was issued under the authority of Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252 (22 U.S.C. 223). See R. 2-3, 10-12.

The pattern of the legislation, Presidential Proclamation, and regulations referred to is set forth in our brief in opposition in *Knauff* v. *Shaughnessy*, No. 54, this Term, pending on writ of certiorari, which involves, *inter alia*, the question of the constitutionality of the exclusion procedure thereby established.

proceeding. The petition asked that a decree be entered declaring the procedure established by Section 1 of the Act of May 22, 1918, as amended by the Act of June 21, 1941, and by the Presidential Proclamation and regulations issued pursuant thereto (see footnote 1, *supra,* p. 3), to be unconstitutional, particularly in so far as this procedure authorizes the exclusion of an alien without a hearing before a board of special inquiry. The petition also prayed that petitioner's continued detention without a hearing be declared illegal, and that the order of permanent exclusion be declared void. Ancillary injunctive relief was also requested. (R. 5.)

On February 12, 1949, pursuant to 28 U.S.C. [1948 rev.] 2282 and 2284, a three-judge statutory district court, consisting of Circuit Judge Proctor and District Judges Letts and Holtzoff, was convened to determine the constitutional issue presented by the petition for declaratory and injunctive relief (R. 7). The three-judge court held, in a memorandum opinion filed March 7, 1949 (R. 13-14), that "Without expressing any opinion as to whether the plaintiff has pursued a proper remedy, * * * an alien seeking entry into the United States has no standing to attack the constitutionality of an Act of Congress and that, in any event, the Act in question is constitutional." The cause was ordered remanded to "a single judge for such further proceedings as may be ap-

propriate" (R. 14). Petitioner took no appeal from this decision of the three-judge court under 28 U.S.C. [1948 rev.] 1253 (see Pet. 8).

The single-judge district court (Holtzoff, D. J.), on April 1, 1949, entered an order dismissing the petition for a declaratory judgment (R. 20). In an accompanying opinion (R. 23-25), Judge Holtzoff, after referring to the fact that the constitutional issue had been disposed of by the three-judge court, said (R. 23-24):

> It seems to the Court that this is the type of case in which the Court should decline to entertain actions for declaratory judgment. An alien seeking admission to this country, who is excluded by the action of immigration authorities, has a remedy by way of a writ of habeas corpus. Such a proceeding necessarily must be brought in the district in which the alien is being detained. That generally is the district of the port of entry. His action for a declaratory judgment, however, may be brought only in the United States District Court for the District of Columbia, because the defendant would be either the Attorney General or the Commissioner of Immigration and Naturalization, or both, each of which officials is a resident of the District of Columbia.
>
> It is inconceivable and even appalling that every exclusion and deportation order should be capable of being brought for a review into the District of Columbia. If that were possible, the administration of the immigration

> laws would be greatly hampered, impeded and interfered with. On the other hand, the plaintiff is fully protected by being permitted to have the administrative action reviewed in a habeas corpus proceeding in the proper district, which in this instance is the Southern District of New York.

On appeal to the Court of Appeals for the District of Columbia Circuit, the order dismissing the petition for a declaratory judgment was affirmed (R. 29), the court observing in a *per curiam* opinion (R. 28):

> While this suit is for a declaratory judgment, it is substantially similar to an application for a writ of *habeas corpus,* because, in addition to the claim of unconstitutionality, it complains that the appellant's detention without a hearing is unlawful. *Habeas corpus* would lie only in the Southern District of New York, where the appellant was detained on Ellis Island at the time this suit was instituted. An action for declaratory judgment cannot be substituted for *habeas corpus* so as to give jurisdiction to a district other than that in which the applicant is confined or restrained. If the appellant has a right to the sort of declaratory judgment which he seeks, he must assert it in the Southern District of New York, as he would be required to do if he had elected to apply for a writ of *habeas corpus.* The District Court properly dismissed the action, because it lacked jurisdiction.
>
> We express no opinion, and mean to inti-

mate none, as to whether the appellant is entitled either to a writ of *habeas corpus* or to a declaratory judgment.

ARGUMENT

Petitioner argues (Pet. 15-28) constitutional issues which he asserts are presented by the legislation, Presidential Proclamation, and regulations (see footnote 1, *supra,* p. 3) pursuant to which he was ordered permanently excluded from the country without a hearing before a board of special inquiry, but it is clear that these issues are not properly before the Court in this proceeding.[2] The sole ground of the Court of Appeals' affirmance of the District Court's dismissal of the petition for a declaratory judgment was the District Court's lack of jurisdiction to entertain it. We think the Court of Appeals' judgment is correct.

The operation of the Declaratory Judgment Act, *supra,* p. 2, is procedural only; it merely provides a new remedy in cases or controversies otherwise cognizable by federal district courts. *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240. It does not enlarge the jurisdiction of district courts. *Clark* v. *Memolo,* 174 F. 2d 978, 980 (C.A.D.C.). Apart from specific exceptions created by Congress, the jurisdiction of district courts is territorial, and the power of a district court to inquire into restraints of liberty is limited to cases of persons

[2] Such issues are involved in *Knauff* v. *Shaughnessy,* a habeas corpus case pending on writ of certiorari, No. 54, this Term.

who are confined or restrained within its territorial jurisdiction;[3] it is not sufficient that the jailor or custodian alone be found in that jurisdiction. *Ahrens* v. *Clark,* 335 U. S. 188, 190-192.[4] Since petitioner is now confined in the Southern District of New York, it is plain that the United States District Court for the District of Columbia derives no power from the Declaratory Judgment Act,[5] which is procedural only, to effect his release indirectly by a declaration of rights. In other words, if that court has no power to inquire into the alleged restraint of petitioner's liberty, it has no power to effect his release under any form of procedure. Cf. *Clark* v. *Memolo, supra. Perkins* v. *Elg,* 99 F. 2d 408 (C.A.D.C.), modified, 307 U. S. 325, and *United States ex rel. Trinler* v. *Carusi,* 166

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[3] The only statutory exception to the territorial limitation on jurisdiction in restraint-of-liberty cases appears to be 28 U.S.C. 2255, which now authorizes a convicting court to grant the relief normally afforded by a writ of habeas corpus, regardless of where the convicted person happens to be incarcerated.

[4] It is significant that the words "within its jurisdiction" appearing in the Declaratory Judgment Act, *supra,* p 2, are in substance the same as the words "Within their respective jurisdictions" appearing in the habeas corpus statute, which were construed by this Court in the *Ahrens* case.

[5] The provision in Rule 57 of the Federal Rules of Civil Procedure, which reads: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate," is clearly not applicable in cases where the court in which declaratory relief is sought is without jurisdiction to adjudicate the basic issue presented.

F. 2d 457 (C.A. 3),[6] on which petitioner relies (Pet. 7-8, 9-10, 13), are plainly distinguishable from the case at bar. In those cases, the complainants were not in custody (see 99 F. 2d at pages 413-414 and 166 F. 2d at page 459), and neither of the courts in those cases was called upon to make an inquiry into the cause of a restraint of liberty.

We submit that the language of the Declaratory Judgment Act plainly warrants a construction which denies a district court jurisdiction to inquire into the cause of restraints of liberty unless the restraint takes place within its territorial jurisdiction. And considerations of policy support that construction, for, as District Judge Holtzoff observed in this case (R. 24; see p. 5, *supra*), "It is inconceivable and even appalling that every exclusion and deportation order should be capable of being brought for a review into the District of Columbia." In the absence of unequivocal language to that effect, it would be improper to impute to Congress an intention to subject the United States District Court for the District of Columbia to such an enormous burden,[7] especially when, as in this

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[6] Mandate recalled, judgment vacated, and cause dismissed as abated for failure to make timely substitution, 168 F. 2d 1014.

[7] In this connection, it is significant that Congress when enacting a special declaratory judgment statute (limited to United States citizenship questions) used express language to accomplish its purpose where its desire was that suits thereunder might, at the wish of the complainant, be brought in the District of Columbia court. See Section 503, Nationality Act of 1940 (54 Stat. 1137, 1171; 8 U.S.C. 903).

case, a habeas corpus proceeding in the jurisdiction where the restraint takes place, affords a plain and adequate remedy. A construction of the Declaratory Judgment Act which requires a person who claims to be unlawfully detained to seek relief in the particular jurisdiction where he is confined, makes for orderly judicial administration and avoids the possibility of having a tremendous burden thrown on one court. It will likewise avoid unnecessary litigation, since it is not clear that a denial of relief on the merits in a suit brought in the District of Columbia for declaratory relief would be *res judicata* in a subsequent habeas corpus proceeding brought in the jurisdiction where the complainant is detained. Cf. *Salinger* v. *Loisel,* 265 U. S. 224, 230; *Price* v. *Johnston,* 334 U. S. 266, 287-290.

That the declaratory judgment action was intended by Congress to be preventive rather than curative, and therefore not a substitute for the writ of habeas corpus, is indicated by the statement in the committee report (H. Rep. No. 1264, 73d Cong., 2d sess.) accompanying the bill (H. R. 4337) which later became the Declaratory Judgment Act, reading as follows:

> The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts.

A most simple and striking definition of the procedure is thus made by Professor Borchard, of the Yale University School of Law. He writes:

> The declaratory judgment, it will be recalled, enables parties who are uncertain of their legal rights, and are pecuniarily or otherwise prejudiced by actual or potential adverse claims by others, to invoke the aid of the courts for the determination of their rights before an injury has been done.
>
> Therefore, this form of preventive relief is distinguishable from curative relief in that the latter is incapable of redress until an injury has occurred or the contract broken.

Here, petitioner is in actual custody, awaiting deportation pursuant to an order of permanent exclusion. The "injury has occurred." If his detention is unlawful, habeas corpus in the Southern District of New York, where he is detained, affords a plain and adequate remedy. The courts below were right, therefore, in denying him judicial review by means of a declaratory judgment action in the District of Columbia. Cf. *Ahrens* v. *Clark, supra.*

CONCLUSION

The petition for a writ of certiorari presents no question meriting further review by this Court, and should therefore, it is respectfully submitted, be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOHN R. BENNEY,
PHILIP R. MONAHAN,
Attorneys.

OCTOBER 1949.

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